FILED
APR 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

73-1460

JOHN S. KIRBY, d/b/a
QUIK CHEK OF INDIANA
and QUIK CHEK, INC.,
Petitioner,

v.

P. R. MALLORY & CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TERRENCE P. PEHLER
WILLIAM F. LEMOND
KAMMINS, LEMOND, CARSON & STEWART
412 Union Federal Building
Indianapolis, Indiana 46204
Telephone: (317) 635-4500

C. E. Pauley & Co., Inc., Indianapolis

INDEX

	Page
Opinions Below	1
Jurisdiction	2
The Questions Presented	2
Statutes and Court Rule Involved	2
Statement of the Case	4
Jurisdiction of the Court Below	7
Reasons for Granting the Writ	7
I. It Is Not Necessary to Plead Statutory Law in a Complaint Filed in Federal Court. Courts Take Judicial Notice of the Laws of Congress. If Facts or Evidence that Raise New Issues are Brought to the Attention of the Parties or the Court, the Pleadings May Be Amended "At Any Time" but Failure to Amend Does Not Affect Trial of These Issues	7
II. The Court of Appeals Has Expanded the Decision of the Supreme Court to an Extent That Reverses the Rationale of That Decision	10
Conclusion	13
Appendix	A1

TABLE OF AUTHORITIES CITED

Cases *Page*

F.T.C. v. Meyer, 390 U.S. 341, 19 L.Ed.2d 1222, 88 S.Ct. 904 (1968) 2, 10, 11

Foman v. Davis, 371 U.S. 178, 182; 83 S.Ct. 227, 330; 9 L.Ed.2d 222 (1962) 10

Security and Exchange Commission v. Rapp, 304 F.2d 786 (1962) 9

Vine v. Beneficial Finance Company, Inc., 374 F.2d 627 (2d Cir. 1967) 10

Statutes

The Clayton Act, Oct. 15, 1914, c. 323, § 3, 38 Stat. 731, 15 U.S.C. § 14 ..... 3, 4, 7,

The Robinson-Patman Act, 38 Stat. 730, as amended, 49 Stat. 1526, 15 U.S.C. § 13 ..... 3, 4, 5, 7, 12

Miscellaneous

Federal Rule of Civil Procedure 15(b) 2, 9

29 AM. Jur. 2d, Evidence, Sections 27 and 32 ..... 8, 9

61 AM. Jur. 2d, Pleading, Section 9 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

JOHN S. KIRBY, d/b/a
QUIK CHEK OF INDIANA
and QUIK CHEK, INC.,
Petitioner,

v.

P. R. MALLORY & CO., INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, John S. Kirby, d/b/a Quik Chek of Indiana and Quik Chek, Inc., respectfully petitions this court to issue a writ of certiorari to the United States Court of Appeals For The Seventh Circuit to review the decision of that court rendered in these proceedings on November 27, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is not yet reported. It appears at Appendix A, *infra*, p. A1. The District Court's Order Granting Motion for

Summary Judgment, Memorandum of Decision and Findings of Fact is not reported. It appears at Appendix B, *infra*, p. A-15.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USCA 1254(1). The judgment of the Court of Appeals for the Seventh Circuit was entered on November 27, 1973.

QUESTIONS PRESENTED

1. Does the Court of Appeals ignore the state of the law on the requirements of pleading statutory language by upholding the District Court's failure to consider petitioner's claim under the Clayton Act, thereby using the device of Summary Judgment to sweep away the right of the Petitioner to trial on the merits? Is that action by the Court of Appeals so in conflict with the law as is cited by the Supreme Court and other Circuits as to present a question of substantial importance in need of resolution by this court?

2. Was the Court of Appeals correct in stretching the decision of the Supreme Court in the *F.T.C. v. Meyer*, 390 U.S. 341, 19 L.Ed. 2d 1222, 88 S.Ct. 904 (1968) to cover section 2(e) of the Robinson-Patman Act when *Meyer* specifically was limited on its facts to section 2(d), when *Meyer's* rationale was based entirely on the existence of particular language in section 2(d) which is notably absent in section 2(e), and when the entire intent of the Robinson-Patman Act (and all anti-trust acts) is to prevent just what happened to this petitioner?

STATUTES AND COURT RULE INVOLVED

Federal Rule of Civil Procedure 15 (b):

> . . . "such amendment of the pleadings as may be necessary to cause them to conform to the evi-

dence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

The Clayton Act

Oct. 15, 1914, c. 323, § 3, 38 Stat. 731, 15 U.S.C. § 14:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The Robinson-Patman Act

38 Stat. 730, as amended, 49 Stat. 1526, 15 U.S.C. § 13, provides in pertinent part as follows:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the

> jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers or either of them . . ."

38 Stat. 730, as amended, 49 Stat. 1526, 1527, 15 U.S.C. §§ 13(d), 13(e), provide in full as follows:

> (d) "[I]t shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.
>
> (e) "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

STATEMENT OF THE CASE

The Petitioners ("Kirby") filed suit against the Respondent ("Mallory") alleging that Mallory had violated the Clayton Anti-Trust Act of October 15, 1914, c. 323, section 2, 38 Stat. 730, et seq. and certain amendments thereto

et out in the Robinson-Patman Act of June 19, 1936, hapter 592, section 1, 49 Stat. 1526; 15 USC § 12, et seq. Kirby is a citizen of the State of Indiana with his prin-pal place of business in Indianapolis and Mallory is a orporation incorporated under the laws of the State of elaware and doing business in interstate commerce. Kirby in the business of wholesaling and distributing batteries nd related products. In the course of said business, Kirby urchased and distributed for resale certain products manu-actured by Mallory. Kirby also purchased like products rom other manufacturers; the majority of his sales were of roducts manufactured by the Union Carbide Corporation "Eveready"). Among the customers sold and serviced y Kirby was the Hook Drug Company ("Hook"), which the largest chain retail drug outlet in the State of Indi-na. Hook represented over fifty per cent of Kirby's busi-ess. By a letter dated May 2, 1968, Mallory offered to look to give Hook certain discounts, advertising rebates, nd displays in exchange for the "exclusive" right to sell atteries and related products to Hook. Hook accepted this ffer of Mallory and thereafter refused to buy from Kirby. s a result Kirby lost over fifty per cent of his business. On January 1, 1969, Mallory ceased to honor the agree-ent with Hook Drug Company but thereafter Hook con-nued to purchase exclusively from Mallory and not from Kirby. Mr. James J. McKinley, General Sales Manager of Mallory, the same person who executed the above-referred agreement with Hook, stated in his deposition that the eason that Mallory ceased to honor the agreement was hat Mallory had been advised that such policies were in iolation of the law. In the meantime, however, Mallory ad paid to Hook the 7½ per cent promotional allowance ased upon that percentage of total sales by Mallory to look upon proof of advertising expenditures. In addition, ndianapolis was made a local advertising market as a

result of the exclusive agreement, Hook being "tagged" to 75 per cent of the Mallory advertisements in that market area. There was only one other customer of Mallory that was so "tagged" and that was another chain retailer, not a customer of Kirby. No offer of such advertising allowance or "tagging" was made to Kirby or any of his remaining customers. Further, certain store displays were furnished to Hook by Mallory that were not made available to Kirby or Kirby's independent retailing customers.

Testimony by Kirby's affidavit revealed that Hook sold some Mallory batteries to the public at the exact same price that Mallory recommended by a public price list that Kirby sell to his individual retail customers. Without the rebates made available to Hook, Kirby could not sell to his retail customers at a price that the retailers could accept and still compete with Hook.

Motions for Summary Judgment were filed by both Mallory and Kirby and both were denied by the District Court on January 18, 1971. Subsequently the case was set for trial. Before trial was had, both parties filed motions to reconsider their Motion for Summary Judgment and on July 10, 1972, the District Court entered an order granting Mallory's Motion for Summary Judgment. On August 4, 1972, Kirby filed his Notice of Appeal to the Circuit Court of Appeals for the Seventh Circuit.

The gravamen of the case can be summarized as follows:

Kirby originally charged a violation of both the Clayton Act and the Robinson-Patman Act. In the early pre-trial conferences and proceedings Kirby emphasized the violation of Robinson-Patman for the reason that discovery disclosed that Mallory offered to Hook advertising rebates, "tagging" of the Hook name in local Mallory advertisements, and the construction of special advertising displays

for Hook. Kirby knew that these offers were not made to him or to his remaining retailing customers. When discovery disclosed to Kirby that the agreement between Mallory and Hook included a contract for "exclusive-dealing" Kirby added emphasis to his allegation that the Clayton Act was also violated by the exclusivity arrangement. Kirby later attempted to amend his complaint to allege this "exclusive-dealing" arrangement with more specificity, even though these facts were in issue, the Clayton Act was sufficiently pleaded, and statutes need not be specially pleaded. The District Court denied the motion to amend and then granted the Motion for Summary Judgment of Mallory.

JURISDICTION OF THE COURT BELOW

The original jurisdiction of the District Court was pursuant to the Clayton Act, Oct. 15, 1914, c. 323, § 3, 38 Stat. 731, 15 U.S.C. § 14 and the Robinson-Patman Act, 38 Stat. 730, as amended, 49 Stat. 1526, 15 U.S.C. § 13.

REASONS FOR GRANTING THE WRIT

I. It Is Not Necessary To Plead Statutory Law In A Complaint Filed In Federal Court. Courts Take Judicial Notice Of The Laws Of Congress. If Facts Or Evidence That Raise New Issues Are Brought To The Attention Of The Parties Or The Court, The Pleadings May Be Amended "At Any Time" But Failure To Amend Does Not Affect Trial Of These Issues.

The District Court refused to consider Petitioner's case under the Clayton Act. Nowhere in the Order, Memorandum, or Findings of Fact did the District Court consider the Clayton Act. Nor did it consider the issue raised by discovery that respondent contracted with Hook in violation of said Act. (Appendix p. A-15, et seq.)

The Court of Appeals for the Seventh Circuit at least touched upon the area of the Clayton Act in order to dismiss Petitioner's claim thereunder. This latter court found that Petitioner's inclusion in his complaint of the following, "This action arises under the Clayton Act . . . as amended by the Robinson-Patman Act . . . as hereinafter more fully appears" was "a mere formal citation to the Clayton Act . . ." and that the reference did not "provide sufficient notice to Mallory [Respondent] to answer or to prepare for trial on a Clayton Act exclusivity issue." (Appendix, pp. A10 and A11.) The court found further nothing in "the statement of facts" suggests a claim of a Clayton Act violation. The court concludes that by failing to include such an allegation in the statement of facts and failing to timely amend the complaint when those facts became known, the Petitioner waived any right to be protected under the Clayton Act. (Appendix, pp. A10 and A11.)

As to this finding of the Court of Appeals, it is clear that it is against the great weight of authority and that it is not necessary to plead any statute. This irrevocable conflict in such a substantial area of procedure needs to be focused upon by this Court.

> "It is a universally recognized rule that the Courts . . . take judicial notice of its own public statutes or the general laws of Congress and it is accordingly unnecessary . . . to plead the laws of the United States . . ." *61 AM. Jur. 2d, Pleading, Sec. 9.*
>
> "In general, courts will take judicial notice of the law prevailing within the forum whether the law in question is written or unwritten. All courts, whether State or Federal, take judicial notice of the Federal Constitution and its Amendments, of the public general acts of Congress, and of the Treaties of the United States." *29 AM. Jur. 2d, Evidence, Sec. 27.*
>
> "Moreover, all courts, Federal and State alike,

take judicial notice of the public and general acts of Congress." *29 AM. Jur. 2d, Evidence, Sec. 32.*

It is clear then that the Court of Appeals, as the District Court below, should have had to consider the facts as developed during pre-trial discovery under the law that that is extant. By ignoring the law, these Courts swept away the right of the Petitioner to a full hearing to which he is entitled. To do this, the case law and the Rules of Civil Procedure had to be ignored.

A holding that Petitioner's attempt to amend his complaint was untimely *(or even necessary)* is clearly contrary to the Civil Rule of Procedure 15(b) and the cases thereunder.

> ". . . such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues." *Fed. R. Civ. P. 15 (b).*

In reference to the consideration of all issues raised by the evidence, whether pleaded or not, another Circuit has held:

> "This is mandatory, not merely permissive. The rule then provides for free or delayed amendment, but states that 'failure to do so does not affect the result of trial of these issues.' Indeed formal amendment is needed only when evidence is objected to at trial as not within the scope of the pleadings." *Security And Exchange Commission v. Rapp,* 304 F.2d 786 (1962), at 790.

So an amendment of the pleadings was not even necessary, contrary to the finding of the Court of Appeals in this case.

If a statute need not be pleaded and if trial must be had on new issues raised without formal amendment, Summary Judgment must not be granted without consideration of all the law and all these issues. That the District Court

did so, and that the Court of Appeals affirmed, is in contradiction of the law elsewhere and cries out for the attention of the Supreme Court.

To show that the District Court had discretion to deny a motion to amend, the Court of Appeals cites *Vine v. Beneficial Finance Company, Inc.*, 374 F.2d 627 (2d Cir. 1967) which in turn cites *Foman v. Davis*, 371 U.S. 178, 182; 83 S.Ct. 227, 330; 9 L.Ed. 2d 222 (1962). It is without dispute that a court has the discretion to deny an amendment but the Court of Appeals is so expanding the finding in *Foman* as to change its meaning. In the proceeding in this case the Respondent knew of the evidence of the "exclusive-dealing" letter before the Petitioner did. When the Petitioner did learn of its existence through discovery, the Respondent simultaneously became aware of its being in evidence. (Appendix, p. A11.) There was no way then that the Petitioner in this case was guilty of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously claimed, undue prejudice to the opposing party by virtue of the amendments, etc." And therefore "the leave sought should, as the rules require, be 'freely given'." *Foman v. Davis (supra)* 371 U.S. 178, 182.

II. The Court Of Appeals Has Expanded The Decision Of The Supreme Court To An Extent That Reverses The Rationale Of That Decision.

Mr. Justice Harlan, in his descenting opinion in *F.T.C. v. Fred Meyer, Inc. (supra)* 390 U.S. 341, at 359 states that "No doubt, the broad purpose of the [Robinson-Patman] Act was to protect small sellers from the advantages their larger competitors can obtain through greater buying power. In implementing this purpose, however, the statute imposes a hodgepodge of confusing, inconsistent, and frequently misdirected restrictions."

In the context of such a statute, Mr. Chief Justice Warren in speaking for the majority attempted to delicately differentiate between the sections of the Act in order to enforce the original intent of the Congress. Mr. Warren agreed "that the Robinson-Patman amendments by no means represent an exemplar of legislative clarity . . .". *F.T.C. v. Fred Meyers, Inc., (supra)* 390 U.S. 341, at 349. The majority did, however, attempt to interpret the Congressional intent but limited its opinion to section 2(d) only and just to the "concrete facts" in that case. Given these two restrictions, the majority found that the use of the language in section 2(d) of "customers competing in the *distribution*" limits its application to "impose proportional equality only where buyers competed on the same functional level." (Court's emphasis) *F.T.C. v. Fred Meyer, Inc., (supra)* 390 U.S. 341, at pp. 355-356. To further emphasize the importance of the word "distribution" in § 2(d), the majority stated that "Congress reasonably could have employed such a broad concept of competition in § 2(d) [but] we do not believe that the use of the word 'distribution' rather than 'resale' is a clear indication that it did. . . ." *F.T.C. v. Fred Meyer, Inc., (supra)* 390 U.S. 341, at p. 356. The court went on to state that when Congress wished to expand the meaning of a section to apply to more than those on the same functional level "it knew how to do so in unmistakable terms. It did so in § 2(a) of the Act by prohibiting price discrimination that may 'injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.' " *F.T.C. v. Fred Meyer, Inc., (supra)* 390 U.S. 341, at p. 357.

So *Meyer* indicates to us the interpretation of the Supreme Court as to § 2(d) and to § 2(a) but this interpretation begs the question on § 2(e). This latter section is

notably lacking in the use of the term "customers competing in the *distribution*". When the majority in *Meyer* emphasizes the use of the word "distribution" rather than the word "resale" it is saying that when "resale" takes its place, the application will be a much broader one. Section 2(e) of the Robinson-Patman Act reads "it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for *resale*. . . ." (our emphasis) 38 Stat. 730, as amended, 49 Stat. 1526, 15 U.S.C. § 13.

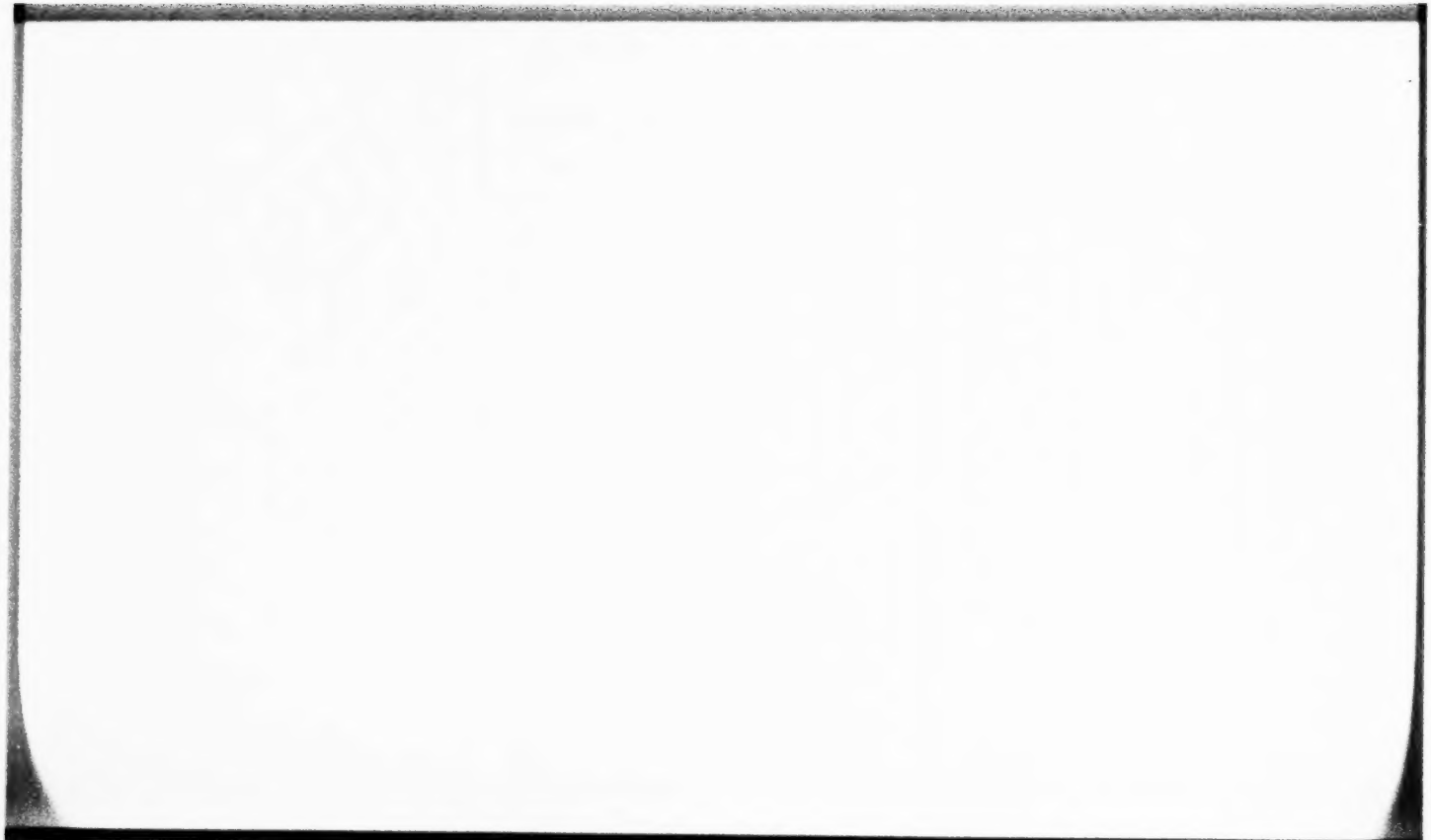
As the interpretation of section 2(e) was not reached in *Meyer*, the Court of Appeals urges upon us a finding that 2(e) is limited to the extent that 2(d) is limited. To reach this conclusion it shows us where in the past 2(e) has been found to be a companion of 2(d). All the cases cited by the Court of Appeals to support this holding predate the *Meyer* decision. These older cases were not written in light of the landmark *Meyer* case which found for the first time the acute difference between 2(d) and 2(e). Therefore, it now becomes imperative to decide if *Meyer* overturns these old cases to the extent that they ignore the difference in the language of 2(d) and 2(e) that *Meyer* found. If certiorari is not granted the opinion of the Court of Appeals will stand to reverse the rationale of *Meyer*.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Seventh Circuit.

TERRENCE P. PEHLER
WILLIAM F. LEMOND

KAMMINS, LEMOND, CARSON & STEWART
412 Union Federal Building
45 North Pennsylvania Street
Indianapolis, Indiana 46204
Telephone: (317) 635-4500



APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1973—SEPTEMBER SESSION, 1973

---

o. 72-1779

OHN S. KIRBY, d/b/a QUIK-CHEK OF INDIANA and QUIK-CHEK, INC., *Plaintiffs-Appellants,*

v.

. R. MALLORY & CO., INC., *Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP 68 C 388

JAMES E. NOLAND, *Judge*

RGUED SEPTEMBER 12, 1973 — DECIDED NOVEMBER 27, 1973

Before CASTLE, *Senior Circuit Judge,* and FAIRCHILD and ELL, *Circuit Judges.*

CASTLE, *Senior Circuit Judge.* Plaintiff John S. Kirby oing business as Quik-Chek of Indiana and Quik-Chek, c.) appeals from an order granting summary judgment Defendant P. R. Mallory & Co. in an action in which rby sought $500,000 for damages allegedly sustained by allory's violation of antitrust law. On this appeal, Kirby ims several sources of district court error: the deternation that no violation of the Robinson-Patman Act curred, the finding that Kirby's complaint failed to state laim under section 3 of the Clayton Act, the denial of rby's motion for leave to amend his pleadings, the

granting of Mallory's motion for summary judgment after its previous denial, and the finding that no genuine issue as to any material fact existed. We find no error, and we affirm the order of the district court.

Kirby is a rack jobber of principally Eveready batteries. He wholesales batteries to retail stores for resale to consumers, and he also services the stores' battery display racks. Prior to 1968, Kirby's chief customer was the Hook Drug Co., the largest retail drug chain in Indiana, which represented about 50% of Kirby's business. Mallory, Eveready's primary competitor in the manufacture of batteries, had sought the Hook account for some years. It had been rebuffed by Hook, because Mallory offered sales without service. Kirby also refused Mallory's request to change Hook's battery inventory to Mallory. In late 1967 or early 1968, Hook altered its policy and decided to service its own battery display racks. Hook then requested Eveready, Mallory and Kirby to submit bids for only the sale of batteries. Hook accepted Mallory's offer. As set forth in a May 2, 1968 letter from Mallory's sales manager McKinley, to Roesch, Hook's vice president, Mallory's terms to Hook corresponded with its terms to Kirby, with three exceptions: Hook was given a cooperative advertising allowance of up to 7½% of Hook's net purchases from Mallory, payable on proof of actual expenditure; Hook was to be "tagged" in 62½% of Mallory's Indianapolis radio advertising per year; and Hook was to be paid the construction cost of battery display racks conforming to Hook's decors. While the agreement was effected on September 10, 1968, the cooperative advertising allowance aspect was terminated on December 31, 1968. Hook's net purchases during this period were $81,494, entitling it to a $6,100 allowance. Mallory offered the allowance to other direct-purchase retailers, but it excluded wholesalers like Kirby who did not sell to the public. Mallory tags its largest retailers (direct-buying retailers and wholesalers' customers) within the "Indianapolis advertising market." Mallory has not extended this offer to either its direct-purchase retailers outside the Indianapolis market or to Kirby's 125 retailers throughout the state. Mallory also furnishes battery display racks

various sizes and kinds to its customers, both direct-
ying retailers and wholesalers.

I.

Kirby alleged in his complaint that Mallory contracted
sell its batteries to Hook "at prices below which prod-
ts of like grade and quality" were sold to Kirby, a vio-
ion of Robinson-Patman Act § 2(a).[1] During discovery,
became evident that Mallory had offered identical price
iedules and discounts to Hook and Kirby, and Kirby
fted the basis of his complaint to §§ 2(d) and 2(e) of
Act.[2] Specifically, Kirby argued that Mallory's co-
erative advertising allowance was contrary to § 2(d)
that it was a payment to Hook as compensation for

---

38 Stat. 730, as amended, 49 Stat. 1526, 15 U.S.C. § 13, provides in
tinent part as follows:

"(a) It shall be unlawful for any person engaged in commerce, in
the course of such commerce, either directly or indirectly, to discrim-
inate in price between different purchasers of commodities of like
grade and quality, where either or any of the purchases involved in
such discrimination are in commerce, where such commodities are sold
for use, consumption, or resale within the United States or any Terri-
tory thereof or the District of Columbia or any insular possession or
other place under the jurisdiction of the United States, and where the
effect of such discrimination may be substantially to lessen competi-
tion or tend to create a monopoly in any line of commerce, or to injure,
destroy, or prevent competition with any person who either grants or
knowingly receives the benefit of such discrimination, or with customers
or either of them. . . ."

38 Stat. 730, as amended, 49 Stat. 1526, 1527, 15 U.S.C. §§ 13(d),
e), provide in full as follows:

) "[I]t shall be unlawful for any person engaged in commerce to pay
or contract for the payment of anything of value to or for the benefit
of a customer of such person in the course of such commerce as com-
pensation or in consideration for any services or facilities furnished by
or through such customer in connection with the processing, handling,
sale, or offering for sale of any products or commodities manufactured,
sold, or offered for sale by such person, unless such payment or con-
sideration is available on proportionally equal terms to all other cus-
tomers competing in the distribution of such products or commodities.

"It shall be unlawful for any person to discriminate in favor of one
purchaser against another purchaser or purchasers of a commodity
bought for resale, with or without processing, by contracting to furnish
or furnishing, or by contributing to the furnishing of, any services or
facilities connected with the processing, handling, sale, or offering for
sale of such commodity so purchased upon terms not accorded to all
purchasers on proportionally equal terms."

services furnished by Hook in connection with the offering for sale of Mallory's products not proportionally available to Kirby, a customer competing in the distribution of the product. Kirby also argued that the radio tagging and the display units were unlawful under § 2(e), which prohibits discrimination among purchasers (such as Kirby and Hook) of batteries bought for resale by contracting or contributing to the furnishing of services or facilities connected with the offering for sale of batteries on terms not accorded on a proportionally equal basis.

With respect to the cooperative advertising allowance, the question of liability depends on the applicability of § 2(d) to customers on different functional levels who compete in the distribution of Mallory's products. That issue was decided in *F.T.C.* v. *Fred Meyer, Inc.*, 390 U.S. 341 (1968), a case involving a direct-buying retailer who induced his suppliers to grant him promotional allowances not proportionally available to the suppliers' wholesale customers or the wholesalers' retail customers. The Federal Trade Commission found this practice violated the statutory language of § 2(d) that allowances be "available on proportionally equal terms to all other customers competing in the distribution of such products" and required that the suppliers' wholesale customers be granted proportional allowances. The Supreme Court held, however, that § 2(d) did not require proportional equality between Meyer, the direct-purchase retailer, and the wholesalers; rather, retailers purchasing from wholesalers are the suppliers' "customers" for purposes of the Act and are entitled to proportionally the same allowance received by the competing direct-buying retailer. The Court responded to the Commission's interpretation of § 2(d):

> The Commission believed it found support for its position in the language of § 2(d) itself, which requires that promotional allowances be accorded on proportionally equal terms to "customers competing in the *distribution* of a supplier's product rather than merely to customers competing in resales." The majority reasoned that [the wholesalers], when they resold to Meyer's retail competitors, were competing with Meyer in the distribution of [the suppliers'] products because

the two wholesalers were "seeking the same consumer dollars that respondents are after." 63 F.T.C., at [43]. While it cannot be doubted that Congress reasonably could have employed such a broad concept of competition in § 2(d), we do not believe that the use of the word "distribution" rather than the word "resale" is a clear indication that it did, and . . . the congressional hearings [indicate] that the section was meant to impose proportional equality only where buyers competed on the same functional level. 390 U.S. at 355-356.

us, even though Kirby and Hook are customers com-ing in the distribution of Mallory products in an ulti-te sense, Kirby cannot rely on the literal statutory lan-age to assert liability, because Kirby, a wholesaler, and ok, a direct-buying retailer, do not compete on the same ctional level.

Kirby replies that even if *Meyer* limits the scope of (d) to customers competing on the same functional level, llory is still liable because Hook is not only a direct-ing retailer but also a wholesaler, like Kirby. Kirby ues that when labels are disregarded, Hook's whole-ng nature is revealed by its performance of the follow-wholesaling functions: the chain buys directly from nufacturers, obtains a wholesaler's discount, warehouses goods, distributes the goods to many outlets, and serv-the outlets' displays. We agree that a functional analy-is necessary to determine whether customers are in competing on the same distributive level. *F.T.C.* v. *plicity Pattern Co.*, 360 U. S. 55, 62-63 (1959) However, n before the Robinson-Patman Act, it was well-settled the litmus test of a wholesaler is the character of his ng, not his buying. *Mennen Co.* v. *F.T.C.*, 262 U. S. 759 23); *see,* A. Neale, *The Law of Anti-Trust in the U.S.A.* 253 (2d ed., 1969). *F.T.C.* v. *Rubberoid Co.*, 343 U. S. on which Kirby relies, supports this finding. *Rubberoid* ls that traders, whatever their designations, who com-e at the same level must be granted the same discount. ooking through form to substance, the Court found a Rubberoid customer who claimed to be an "appli-r" (a contractor who uses the product himself) was in

fact a wholesaler, because he resold the product to other applicators. Unlike both Rubberoid's applicator and Kirby, Hook is not reselling Mallory batteries to retailers; Hook sells solely to ultimate users. Hook's internal economies through the provision of services formerly performed by a wholesaler do not in themselves transform a retailer into a wholesaler. Since § 2(d) mandates proportional equality only between customers on the same functional level, we hold that Mallory was not required to grant the cooperative advertising allowance to Kirby.

Kirby next argues that even if *Meyer* limits the applicability of § 2(d) to customers competing at the same level, this restriction does not apply to § 2(e), which protects "purchasers of a commodity bought for resale." As this language resembles that found in § 2(a) ("purchasers of commodities . . . sold for . . . resale") and as Congress intended to expand the meaning of competition in § 2(a) to include more than resellers operating on the same functional level, *see, F.T.C.* v. *Fred Meyer, Inc., supra* at 355, the scope of § 2(e) must therefore be similarly expansive. Kirby's reliance on the disparities in statutory language fails to account for the coordinated nature of the two sections:

> Sections 2(d) and (e) of the Act deal with discrimination in the field of promotional services made available to purchasers who buy for resale. Where the seller pays the buyer to perform the service, Section 2(d) applies. Where the seller furnishes the service itself to the buyer, Section 2(e) applies. *F.T.C. Guides for Advertising Allowances and Other Merchandising Payments and Services* (1960).

Although the text of the two sections contains a spate of semantic variation, § 2(e) has long been viewed as coterminous with § 2(d), and courts have consistently resolved the two sections into an harmonious whole. 82 HARV. L. REV. 63, 269-270 (1968); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 390 (1962); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F.2d 988, 992-993 (8th Cir., 1945), *cert. den.*, 326 U.S. 773 (1945). For example, judicial interpretation has implied § 2(e)'s in-

terstate commerce requirement into § 2(d). Decisions have not distinguished the "customers" of § 2(d) from the "purchasers" of § 2(e) and have considered allowances "available" and services "accorded" whenever openly offered to buyers. This court would therefore feel compelled to interpolate into § 2(e) the prerequisite of directly competing purchasers had this not previously been established by judicial doctrine. *Elizabeth Arden, Inc.* v. *F.T.C.*, 156 F.2d 132 (2d Cir. 1946), *cert. den.*, 331 U.S. 806 (1947); *F.T.C.* v. *Simplicity Pattern Co., supra,* at 62-63. This court has expressly held, "For [§ 2(e)] to be applicable, the favored customers must be competitors of the [disfavored] plaintiff." *Centex-Winston Corp.* v. *Edward Hines Lumber Co.*, 447 F.2d 585, 588 (1971) (Cummings, J.). Section 2(e) is therefore equally unavailing for Kirby. Since Kirby was not Hook's competitor, Mallory is not required to furnish Kirby with proportionately equal radio tagging or displays.

We carefully limit these findings to the facts of this case, recognizing, as did the Supreme Court in *Meyer,* that "it would be both inappropriate and unwise to attempt to formulate an all-embracing rule applying the elusive language of the section to every system of distribution." 360 U.S. at 357. As in *Meyer,* the facts clearly indicate that the direct impact of competitive discrimination is felt by the retailers with whom Hook competes. Therefore, the most reasonable construction of the statute requires proportionally equal treatment only among those competing directly. *Id.*

Kirby further asserts that Mallory's discrimination in promotional payments and services represents indirect price discrimination, proscribed by § 2(a), irrespective of the favored and disfavored customers' positions in the distribution chain. This argument fails, however, to distinguish adequately between indirect price discrimination and disproportionate payments of services. This was clarified by *New England Confectionery Co.*, 46 F.T.C. 1041 (1949), in which the Commission stressed that a seller's payments as well as services in connection with the *original* sale to the purchaser rather than with regard to

the purchaser's subsequent *resale* were not cognizable under §§ 2(d) or 2(e) but were challengeable only under § 2(a) as indirect price discrimination. *See* Rowe, *supra*, at 107, *American Can Co.* v. *Russelville Canning Co.*, 191 F.2d 38, 56 (8th Cir. 1951). In the present case, it is apparent that the payments and services to Hook are provided not in connection with the original sale from Mallory to Hook but rather with respect to projected resales. The alleged violations in this case are properly exclusively subsumed under §§ 2(d) and 2(e), rather than § 2(a). Moreover, the theory that §§ 2(d) and 2(e) proscribe acts which are themselves prohibited by § 2(a) is not supported by either legislative history or the scheme of the Act. Senator Logan, the Senate floor manager of the bill, indicated that §§ 2(d) and 2(e) were devised to specifically cover a "second scheme" designed to evade the price discrimination outlawed in the original Clayton Act. 80 Cong. Rec. 6282 (1936). The Report of the House Judiciary Committee stated that the aims of the amendment were "to suppress more effectually discriminations between customers of the same seller, . . . sometimes effected directly in prices . . . and sometimes by separate allowances to favored customers . . ." H.R.Rep. No. 2287, 74 Cong., 2d Sess. 7 (1936). Congress, noting the distinction between the two schemes, imposed stricter standards of legality respecting promotional discriminations than price discriminations. Price discrimination is lawful if it can be justified under several exculpatory provisos or has no effect on competition. In contrast, promotional discrimination is illegal per se, irrespective of competitive impact and without resort to statutory justification. *See,* Rowe, *supra,* at 372. Kirby's argument would have us collapse the distinction in schemes and standards and would have us find that the two sections are mere surplusage. This we decline to do. In view of the strict standards of §§ 2(d) and 2(e), which focus on resale, it appears quite clear that Congress carefully considered the deficiency in the original law proscribing price discrimination in the supplier-customer sale and drafted §§ 2(d) and 2(e) to apply exclusively to promotional discriminations like those alleged in this case. *See,* Rowe, *supra,* at 362-376.

Finally, Kirby contends that Mallory's payments, tagging, and display units contravened the *Meyer* mandate of proportional equality with respect to Kirby's retailers, Hook's direct competitors. Kirby argues that as he was the principal victim of the promotional discrimination, he is entitled to damages. *See, Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 649 (1969). We find that the district judge properly concluded there was no violation of the Robinson-Patman Act with respect to the display units. Kirby stated he was known as a rack jobber of Eveready batteries who relied on Mallory primarily for hearing-aid and mercury batteries. He used other Mallory batteries only when Eveready batteries were unavailable to him. Kirby admitted that Mallory had furnished him with display racks for hearing-aid batteries and eight-pin blister batteries, which Kirby had in fact given to his retailers. Mallory stated that as an inducement to Kirby to switch the inventory of Hook (prior to 1968), Mallory offered to supply Kirby for Hook's use with units comparable to those ultimately built for Hook (and supplied by Mallory to other large buyers, including wholesalers). Given the nature of Hook's and Kirby's respective purchases and the nature of the racks actually supplied to each of them, it was well within the province of the judge to find as a matter of law based on uncontested facts that the units furnished each of them were proportionally equal. *See generally, Bond Distributing Co.* v. *Carling Brewing Co.*, 325 F.2d 158 (4th Cir. 1963); *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.*, 306 F.2d 61 (3rd Cir. 1962), *cert. den.* 371 U.S. 951 (1963).[3]

It is uncontested that Mallory offered neither allowances nor advertising tagging for Kirby's retail customers. However, before a party protected by the Act can recover

[3] In Interrogatory 35, Kirby was asked without specification of context if he had constructed or caused to be constructed for his customers' use, racks comparable to those furnished to Hook. He replied in the affirmative, without stating whether those racks were intended to hold Eveready or Mallory batteries. Because of our conclusion supporting the finding of the trial court that Mallory did not violate the Robinson-Patman Act with respect to the furnishing of display racks, we need not reach the question of whether Kirby's expenses for the construction of these racks were causally related to any action taken by Mallory.

damages, he must prove both actual injury and causality between the violation and the injury. *Perkins* v. *Standard Oil Co., supra,* at 648; 31 Md. L.Rev. 60 (1971). We find the court below correctly determined on the basis of undisputed facts that Kirby suffered no general damages. Kirby admitted that neither he nor his retailers engaged in any advertising of Mallory batteries to offset the expenditure granted Hook. Kirby further admitted that he undertook no advertising resembling the tagging given Hook and that he had no knowledge of any similar activity on the part of his retailers. Kirby did state that for the purpose of offsetting the tagging, he hired a salesman, bought additional equipment, and sought other products for resale. It is obvious, however, that these expenses are unrelated to any injury suffered by Kirby's customers because of promotional discrimination. Rather, these costs result from Kirby's efforts to replace his Hook business, a cost not related to a legal wrong. The record further establishes that Kirby suffered no special damages. Kirby admitted that his retailers had not reported any sales lost to them because of Mallory's agreement with Hook. If Kirby's customers suffered no sales losses from the agreement, Kirby cannot tenably maintain that he suffered any loss of profit from Mallory's action. *Accord, State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Co.,* 202 F. Supp. 768, 775 (N.D. Ill. 1961).

II.

Kirby asserts that the court below erroneously ignored the claim allegedly made in his complaint that Mallory had made an exclusive-dealing arrangement with Hook, unlawful under section 3 of the Clayton Act. Kirby apparently predicates this contention on the inclusion in his complaint of the following, "This action arises under the Clayton Act . . . as amended by the Robinson-Patman Act . . . as hereinafter more fully appears." Respecting sufficiency of the pleadings, the Federal Rules of Civil Procedure require only " 'a short and plain statement of the claim' that will give the defendant fair notice of what plaintiff's claim is and the grounds on which it lies." *Conley* v. *Green,* 355 U.S. 41, 47 (1957). We find that a

mere formal citation to the Clayton Act to focus attention on its amendment, the Robinson-Patman Act, does not provide sufficient notice to Mallory to answer or to prepare for trial on a Clayton Act exclusivity issue. Further, nothing in the statement of facts suggests a § 3 claim. The substance of the claim is, "Defendant has contracted to sell Defendant's products to said Hook Drug Co., Inc., at prices below which products of like grade and quality are sold to Plaintiffs. . . . The Defendant in selling batteries at such unreasonably low prices with the purpose and intent to destroy competition and to eliminate one or more competitors has violated 15 U.S.C.A. Section 15." It is clear that these circumstances relate to price discrimination proscribed by the Robinson-Patman Act (15 U.S.C. § 13) rather than exclusive-dealing, prohibited by the Clayton Act (15 U.S.C. § 14). We conclude that Kirby's original pleadings did not state a Clayton Act § 3 claim.

Kirby next argues that the court erred in refusing to permit him to assert a Clayton Act § 3 claim. We note that the action was commenced on September 24, 1968, and on November 4, 1968, Kirby took Hook's Vice President Roesch's deposition. Attached to the deposition was the May 2, 1968 letter from McKinley to Roesch which Kirby contends establishes the exclusive-dealing. The grant of leave to amend pleadings is within the discretion of the trial court, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 330 (1970), and the only question here is whether the court abused its discretion in denying Kirby's motion. *See Tyne* v. *National Supply Co.*, 280 F.2d 878 (7th Cir. 1960). Kirby's motion was filed on October 4, 1971. It contained no facts unknown to him 2½ years prior to the motion. Yet Kirby did not seek to file his motion until Mallory's motion for summary judgment was reset for oral argument, when Kirby anticipated foreclosure of his Robinson-Patman claim. It is clearly unfair to Mallory to permit Kirby to remain mute for this period and then to bolster his pleadings to prevent an anticipated adverse judgment. *Accord, Vine* v. *Beneficial Finance Co., Inc.*, 374 F.2d 627 (2d Cir. 1967), *cert. den.*, 389 U.S. 970 (1967); *Fowler* v. *Sponge Products Corp.*, 246 F.2d 223 (1st Cir. 1957); *Eisenmann* v. *Gould-National Batteries,*

Inc., 169 F. Supp. 862 (E.D.Pa. 1958). Moreover, between November 1968 and October 1971, extensive pretrial procedure, necessary in antitrust cases to particularize issues of fact, was largely completed. It would be unjust to permit an untimely amendment, materially altering the basis of the action, necessitating additional discovery, conferences, and pre-trial orders and statements. *Gaylord Shops, Inc.* v. *South Hills Shoppers' City*, 33 F.R.D. 303 (W.D.Pa. 1963); *see*, 3 J. Moore, *Federal Practice* ¶ 15.08 [4]. We agree with Judge Major who stated, in finding no abuse of discretion in denial of a motion to amend where the plaintiff, like Kirby, was aware of the necessary facts two years prior to his motion and showed no reason for his delay, "All litigation must sometime be brought to an end, and, in our view, under the circumstances, there was no abuse of discretion. . . ." *Stanek* v. *Trailmobile, Inc.*, 283 F.2d 827, 829 (7th Cir. 1960); *Boris* v. *Moore*, 253 F.2d 523 (7th Cir. 1958).

III.

Kirby moved for summary judgment on July 14, 1969, and Mallory filed a motion for summary judgment on August 21, 1969. These motions were denied on January 18, 1971. Subsequently, on September 21, 1971, the court granted Mallory's motion for reconsideration of its motion for summary judgment. Kirby filed a motion for reconsideration on October 6, 1971. The court granted Mallory's motion for summary judgment on July 10, 1972. On appeal, Kirby asserts that the court below had no authority to reconsider its own decision, a position somewhat inconsistent with Kirby's motion for reconsideration to the trial court. The order of denial of summary judgment is an interlocutory decree, *U. S.* v. *Florian*, 312 U. S. 656 (1941); *Madry* v. *Sorel*, 440 F.2d 1329 (5th Cir. 1971); *Alart Associates, Inc.* v. *Aptaker*, 402 F.2d 779 (2d Cir. 1968), without res judicata effect. 6 J. Moore, *supra* at ¶ 56.14[2]. If good reason is shown why a prior denial of a motion for summary judgment is no longer applicable or should be departed from, the trial court may, in the exercise of sound discretionary power, consider a renewed motion for summary judgment, particularly when the re-

newed motion is based on an expanded record. *Allstate Finance Corp.* v. *Zimmerman,* 296 F.2d 797 (5th Cir. 1961); *Brownfield* v. *Landon,* 307 F.2d 389 (D.C. Cir. 1962); *Beedy* v. *Washington Water Power Co.,* 238 F.2d 123 (9th Cir. 1956); 6 J. Moore, *supra.* On the facts of this case, we find that the court below did not abuse its discretion in granting Mallory's motion for summary judgment after previously denying it. Subsequent to the denial, Kirby answered Mallory's interrogatories. These interrogatories plainly established that Kirby could not show damage either to himself or to his retailers either through loss of sales, out-of-pocket expenses or increased business costs causally related to Mallory's actions. Without a showing of damages, a private action under the Robinson-Patman Act cannot be maintained. The interests of efficient judicial administration compel the empowering of the court to reconsider motions for summary judgment when uncontested facts showing the absence of a necessary element for a prima facie case are revealed subsequent to the court's denial of the motion.

Pursuant to a local rule of the Southern District of Indiana, the court made explicit findings of fact appended to its order granting summary judgment. Kirby admits these facts are "for the most part correctly stated," but he contends that there are some genuine remaining issues of fact. We note that Kirby filed two affidavits: one focused on the Mallory-Hook agreement and stated that Kirby's damage was the loss of the Hook business; the other stated that because Mallory offered its batteries to Hook at wholesale prices, Kirby was unable to sell batteries to retailers at prices permitting them to compete with Hook and still make a profit. We determine that summary judgment was properly granted. It is immaterial that Mallory solicited Hook's business, a fact which Mallory admitted, since Mallory was acting lawfully in seeking sales. The question of the price at which Hook sold batteries to the public is also irrelevant to a promotional discrimination suit, and the court in its discretion need not have stated a finding respecting this price. The extent to which Kirby handled Eveready batteries appears uncontradicted and, in any event, is similarly immaterial to the case. There is

no dispute as to the list prices and discounts offered Kirby and Hook, and Kirby's characterization of the cooperative advertising allowance as price discrimination is a legal, rather than factual issue for the court to decide. Mallory's reason for not offering the allowance to Kirby (that it was only offered to purchasers selling directly to the public), is both undisputed and immaterial. Mallory admitted Kirby's claims that he did not receive an offer of tagging and that his customers did not receive tagging or allowances. It is uncontested that Mallory had racks costing $66.30 each constructed in Hook's stores and that Mallory supplied various kinds of racks to its distributors, including Kirby, depending on individual needs. Mallory had in fact offered Kirby racks comparable to those installed in Hook's stores when it requested Kirby to switch Hook's inventory from Eveready to Mallory. It is likewise uncontested that neither Kirby nor his customers engaged in any advertising of Mallory products. Finally, respecting the court's finding that the promotional discrimination did not result in any loss of Mallory battery sales by Kirby to his retail customers competing with Hook, Kirby stated that he had no knowledge of customers unable to sell batteries in competition with Hook and that he had no record of sales which he could not make to his retailers because of the Mallory-Hook agreement.

The order of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

JOHN S. KIRBY, d/b/a QUIK CHEK OF INDIANA and QUIK CHEK, INC.,

v.

P. R. MALLORY & Co., INC.

NO. IP 68-C-388

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The above entitled cause came before the Court on the respective parties' motions for summary judgment.

The motions for summary judgment were set for argument after the Court had granted a motion of the defendant to reconsider the same. Previously cross-motions for summary judgment of the plaintiff and defendant had been denied. The plaintiff's motion of October 6, 1971, to amend complaint was also denied.

The respective motions for summary judgment were again argued before the Court on March 3, 1972, the facts necessary to the determination of this motion having been presented to the Court on the basis of affidavits, deposition and interrogatories.

The Court now determines that there is no genuine issue as to any material fact, that plaintiffs have no claim and that the defendant is entitled to judgment as a matter of law. Therefore,

IT IS ORDERED that judgment be entered in favor of the defendant with costs to be taxed against the plaintiff.

The Memorandum of Decision, Findings of Fact and Conclusions of Law follow.

DATED this 10th day of July, 1972.

James E. Noland
JAMES E. NOLAND, U. S. District Judge

MEMORANDUM OF DECISION

This is an action for treble damages for alleged violation of the Robinson-Patman Act. 15 U.S.C.A. § 13. The plaintiffs (Kirby) are wholesalers of batteries and other products. The defendant (Mallory) is a manufacturer of batteries.

The material facts discussed herein were established by affidavit, depositions and answers to interrogatories, and there is no dispute as to them. Kirby is what is known as a rack jobber. In addition to selling batteries to his customers, who in turn sell them at retail to the public, Kirby services the display racks in his customers' stores by keeping them stocked, thereby relieving his customers of these duties, for which service presumably Kirby is compensated in the price he charges his customers. For a number of years prior to the events involved in this action, Kirby's principal customer was Hook Drugs, Inc. (Hook), which operates a large chain of retail stores in the State of Indiana. Kirby's sales to Hook amounted various types of battery display racks to its distributors, including Kirby, for the use of their customers. The cost of at least one type of rack Mallory supplied to its distributors exceeded Mallory's cost for the racks Hook got.

At the time Mallory made its proposition to Hook, it was generally believed, and believed by Mallory, that the Robinson-Patman Act only required allowances and services, such as the cooperative advertising allowance and the radio tagging, to be offered on proportionally equal bases to customers who competed on the same functional level. The Supreme Court's subsequent decision in *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 340 (1968), caused suppliers all across the country to reexamine their marketing practices.

Effective January 1, 1969, admittedly in light of the *Fred Meyer* decision, Mallory amended the terms of its sales to Hook and other direct-buying retailers to eliminate the cooperative advertising allowance.

Mallory's battery sales to Hook prior to January 1, 1969, amounted to $81,494.00. The maximum cooperative advertising allowance for which Hook could have qualified on that volume was about $6,100.00. Mallory's total expendi-

ıre for radio advertising during the period from Septem-
er 25 to December 15, 1968, amounted to only $387. Other
etailers than Hook were tagged on this radio advertising,
cluding retailers who purchased batteries through rack
bbers such as Kirby. For example, Ayr-Way, a discount
ore chain, qualified for approximately ten percent of the
dio tagging. None of Kirby's customers qualified for the
dio tagging, because Kirby's total purchase of Mallory
tteries was so small that no customer could have sold
ore than a few Mallory batteries at any time.

Kirby's complaint alleges only a violation of section 2(a)
the Act, 15 U.S.C.A. § 13(a), which prohibits discrimina-
ry pricing. In briefs and in argument Kirby has alter-
tely alleged violations of sections 2(d) and 2(e) of the
t, and finally has asserted that all three provisions were
olated.

Both parties have moved for summary judgment. The
urt finds that the plaintiffs' motion should be denied and
at the defendant's motion should be granted.

The undisputed facts show that both before and after
nuary 1, 1969, the price charged by Mallory for its bat-
ies to Kirby was precisely the same as its price to Hook.
erefore, it does not appear that there can be any viola-
n of section 2(a) of the Act.

Kirby's principal claim of damage is for his loss of profit
sales to Hook. Mallory contends that Kirby, a whole-
er, was not entitled to proportional equality with respect
the allowances and services offered to Hook, a retailer,
d that Kirby's alleged damage was not caused by a viola-
n of the antitrust laws.

At the outset this appears to be a simple case of the
intiffs having lost out in competition with the defendant
the Hook business. Nothing in the antitrust laws pre-
ts a supplier such as Mallory from competing with a
olesaler such as Kirby for the business of a direct-buying
ailer such as Hook. The Court finds that this is essen-
ly all that has happened in this case.

n any event, Kirby is not entitled to recover from Mal-
y on the undisputed facts. But for the cooperative adver-
ng allowance and the radio tagging, the terms of sale

which Mallory offered to Kirby, both before and after January 1, 1969, were the same as the terms Mallory offered to Hook. Whether or not Mallory's failure to extend the offer of the cooperative advertising allowance and the radio tagging to Kirby was unlawful depends upon a proper application of the Supreme Court's decision in *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 340 (1968), to the facts of this case. The problem with respect to the advertising allowance is relatively simple. The *Fred Meyer* case involved a promotional allowance given by various suppliers to Meyer, a large, direct-buying retailer. The Court explicitly held that the act does not require proportional equality between the direct-buying retailer and wholesalers.

> "[W]e hold that, at least on the facts before us, § 2(d) does not require proportional equality between Meyer and the two wholesalers.
>
> "The Commission believed it found support for its position in the language of § 2(d) itself, which requires that promotional allowances be accorded on proportionally equal terms to 'customers competing in the *distribution*' of a supplier's product, rather than merely to customers competing in resales. The majority reasoned that Hudson House and Wadhams, when they resold to Meyer's retain competitors, were competing with Meyer in the distribution of Tri-Valley and Idaho Canning products because the two wholesalers were 'seeking exactly the same consumer dollars that respondents are after.' 63 F.T.C., at —. While it cannot be doubted that Congress reasonably could have employed such a broad concept of competition in § 2(d), we do not believe that the use of the word 'distribution' rather than 'resale' is a clear indication that it did, and what discussion there was of the promotional allowance provision during the congressional hearings indicates that the section was meant to impose proportional equality only where buyers competed on the same functional level." 390 U.S. at 355-56.

Although the Supreme Court dealt only with section 2(d) in the *Fred Meyer* decision, it appears that the Court's decision is also dispositive of the section 2(e) claim in this case. It is virtually unanimously agreed that sections 2(d)

d 2(e) are companions. See Note, 41 Notre Dame Lawyer
2, 383 (1966); *Equisite Form Brassiere, Inc.* v. *FTC.*, 301
2d 499, 500 (D.C. Cir., 1961). The Ninth Circuit explicitly
held in *Standard Oil Co.* v. *Perkins,* 396 F.2d 809, 817-18
h Cir. 1968). Although that decision was reversed with
pect to alleged violations of section 2(a), *Perkins* v.
ndard Oil Co., 395 U.S. 642 (1969), it does not appear
t the ruling with respect to sections 2(d) and 2(e) was
ered.

But even assuming that lack of standing as a member of
class sought to be protected under the principles laid
vn in the *Fred Meyer* decision does not bar the plaintiff
m bringing this action, Kirby is still not entitled to
overy. On the undisputed facts Kirby cannot show that
loss of business he claims as his damages was caused
Mallory's alleged violation of the Robinson-Patman Act.
Hook gave their business to Mallory for the simple reason
t they could buy batteries from Mallory for less than
y could from Kirby. If Mallory was offering to sell its
teries to Kirby and Hook at the same price, as required
the Act, Kirby could not resell the batteries to Hook
meet Mallory's price to Hook. Presumably Kirby
ld have to add a margin of profit which would make his
le price to Hook higher. Therefore, Kirby's loss of the
k business was caused simply by Mallory's having en-
d the bidding and not by a violation of the Robinson-
man Act. The decision in *A. J. Goodman & Son, Inc.* v.
ted Lacquer Mfg. Corp.*, 81 F. Supp. 890 (D. Mass.
9), illustrates the point. In that case the plaintiff sought
sell some yellow traffic lacquer to the State of New
mpshire. The plaintiff made a contract with the defend-
to purchase the lacquer at a price of $1.85 per gallon.
plaintiff then submitted a bid to the state at a price of
7 per gallon. Thereafter, defendant submitted its own
to the state at a price of $1.75 per gallon. The plaintiff's
for treble damages was based upon an alleged viola-
of Section 2(a) and Section 3 of the Robinson-Patman
The Court granted the defendant's motion to dismiss
action, on the ground that the plaintiff could not show
its injury resulted from a violation of the law. The
rt stated on this point:

> "But even assuming that the lowest bidder would have been assured of receiving the contract, it still appears that the cause of plaintiff's loss of the contract was not the fact that defendant's price to the state may have violated the statute, but rather the fact that defendant itself entered the bidding, which did not violate the law. Defendant, if it desires to bid, can always, without violating the law, submit a bid lower than any at which the plaintiff could offer to sell to the state. It would not violate the law by selling to the state at the same price at which it was willing to sell to the plaintiff. Nor would there be any violation if it sold to the state at a price equal to the lowest price at which any of its competitors would supply lacquer to the plaintiff. In either case defendant's price to the state could be equal to the price plaintiff paid, and hence less than the price at which plaintiff could offer to sell to the state and still make any profit on the transaction. The contract would already be lost to plaintiff, and the fact that defendant lowered his price still further so that it was either discriminatory or unreasonably low in itself, could add nothing to the injury." 81 F. Supp. at 893.

Thus, whether or not Mallory violated the Act in offering the allowances and services to Hook, that was not the cause of Kirby's loss of the Hook business.

Beyond the loss of Hook's business, it appears affirmatively from the record that Kirby cannot show any injury caused by Mallory's alleged violation of the Robinson-Patman Act. A similar situation was before the Court in *State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Co.*, 202 F. Supp. 768 (N.D. Ill., 1961). In that case the defendant-suppliers were found to have violated section 2(d) of the Act by purchasing advertising in Woman's Day, a magazine distributed by A&P stores. The payments for advertising in Woman's Day were analogous to the cooperative advertising allowances in this case. The plaintiffs in the case were retailers who were in competition with A&P and wholesalers who sold to retailers who were in competition with A&P. The Court dismissed the whole-

salers' suits against the defendants on the ground that the wholesalers had shown no injury.

> "The case of the plaintiff wholesalers is quite different. None of the plaintiff retailers purchased any of the defendants' products from the plaintiff wholesalers. There is no evidence that any of the plaintiff wholesalers' customers lost any business or suffered an out-of-pocket expense or an increased cost of doing business as a result of the defendants' violation of Section 2(d). If the wholesalers' customers have not been damaged, the wholesalers cannot claim damages through these customers. Nor does the record reveal that the wholesalers have suffered any damages, whether special or general, independent of their customers. For these reasons, I must hold that the fact of damages or injury under Section 4 of the Clayton Act has not been established as to the plaintiff wholesalers. Judgment as to them will be entered in each of the defendants' favor." 202 F. Supp. at 775-76.

Plaintiff's deposition and answers to interrogatories demonstrate that the plaintiff can show no loss of sales to plaintiff's customers who are competing with Hook and no out-of-pocket expense or increased cost of doing business for advertising of any kind. Indeed, Kirby's sales to customers other than Hook have increased substantially.

On the basis of the entire record before the Court it appears that there is no genuine issue as to any material fact and that Kirby has no cause of action against Mallory. Judgment will be entered in accordance with this opinion.

FINDINGS OF FACT

This matter having been submitted to the Court on motions for summary judgment of both parties, depositions, answers to interrogatories and affidavit, the Court finds:

1. This action arises under the Clayton Antitrust Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C.A. § 12, et seq.

2. The Court has jurisdiction of the action under Title 28 U.S.C. § 1337.

3. The plaintiff John S. Kirby is a citizen of the State of Indiana doing business as Quik Chek of Indiana; the plaintiff Quik Chek, Inc., is a corporation organized and existing under the laws of the State of Indiana; and the defendant, P. R. Mallory & Co., Inc., is a corporation organized and existing under the laws of the State of Delaware.

4. The amount of the plaintiffs' claim, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars ($10,000.00).

5. The plaintiffs (Kirby) are wholesalers of batteries and other products.

6. The defendant (Mallory) is a manufacturer of batteries.

7. Kirby is what is known as a rack jobber, which means that in addition to selling batteries, etc., to his customers, he services the display racks to relieve his customers of the responsibilities of keeping them stocked, for which service presumably he is compensated in the prices charged.

8. Hook Drugs, Inc. (Hook) was a customer of Kirby.

9. Kirby handled Eveready brand batteries almost exclusively, Mallory's principal competitor.

10. Kirby's sales to Hook amounted to approximately fifty percent of Kirby's business. Mallory had made repeated efforts to induce Kirby to stock Hook's stores with Mallory batteries rather than Eveready brand batteries, which Kirby refused to do.

11. In 1968 Hook decided it would service its own battery display racks and asked Eveready, Kirby and Mallory each to submit propositions for direct sales of batteries to Hook.

12. Eveready, Kirby and Mallory each submitted competing offers for direct sales of batteries to Hook; Mallory's proposition was the best and was accepted.

13. Mallory commenced selling batteries directly to Hook on or about September 10, 1968.

14. The terms of Mallory's sales of batteries to Hook are set out in a letter dated May 2, 1968, from Mallory's national sales manager to Hook's senior vice president.

15. The prices at which Mallory offered to sell and did sell batteries to Hook was precisely the same as the prices for which it offered to sell and did sell batteries to Kirby.

16. The terms on which Mallory offered to sell batteries to Hook from September 10, 1968, to January 1, 1969, but not thereafter, included a cooperative advertising allowance of up to seven and one-half percent (7½%) of net purchases, the allowance being payable upon proof of actual expenditures for such advertising by Hook. Hook's purchases of batteries from Mallory during the period from September 10, 1968, to January 1, 1969, on which the cooperative advertising allowance would be based totaled $81,494.00. On January 1, 1969, (apparently prompted by the *Meyer* decision in the United States Supreme Court) Mallory amended its terms of sale of batteries to chain store customers, including Hook, so as to eliminate the cooperative advertising allowance entirely. Because Kirby never sold to the consumer market, Kirby was not offered the cooperative advertising allowance.

17. The terms on which Mallory offered to sell batteries to Hook also included an offer to tag and Mallory did tag Hook on some radio advertising, which Mallory purchased in the Indianapolis market area from September 10, 1968, to January 1, 1969. Mallory did offer to tag customers who were not sold directly by Mallory, such as customers who purchased from rack jobbers. For example, Ayr-Way, a discount store chain, qualified for ten percent (10%) of the radio advertising tagging, Ayr-Way having purchased its Mallory batteries from Sanborn Electric Company, another rack jobber. The total expenditure for radio advertising by Mallory during the period from September 25, 1968, to December 15, 1968, was $387.

18. The terms on which Mallory offered to sell batteries to Hook also included an offer to provide, and Mallory did provide, battery display racks specially built to conform to the decor in the Hook Drug Stores. The racks so furnished by Mallory to Hook had a value of $66.30 per unit. Mallory offered and did provide various kinds of comparable battery display racks to its distributors, including Kirby, for the use of their customers. At least one type of

such battery display racks furnished by Mallory to distributors such as Kirby for the use of the distributors' customers cost Mallory approximately $70 per unit, plus freight and cost of assembly in the retailers' stores.

19. Kirby made no expenditures for advertising nor did he provide advertising of any kind for his retail customers.

20. Neither the cooperative advertising allowance, nor the tagging on radio advertising, nor the furnishing of racks by Mallory to Hook, as indicated, resulted in any loss of sales of Mallory batteries by Kirby to his retail customers who compete with Hook.

CONCLUSIONS OF LAW

There is no genuine issue as to any material fact; the law is with the defendant; and summary judgment should be entered for the defendant and against the plaintiffs.

James E. Noland
JAMES E. NOLAND, U. S. District Judge

Date: July 10, 1972.